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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/767,567	01/23/2001	Harold R. Blomquist	TRW(VSSIM)4820	2445
26294	7590	03/24/2004	EXAMINER	
TAROLLI, SUNDHEIM, COVELL & TUMMINO L.L.P. 526 SUPERIOR AVENUE, SUITE 1111 CLEVEVLAND, OH 44114			MILLER, EDWARD A	
			ART UNIT	PAPER NUMBER

3641

DATE MAILED: 03/24/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/767,567

Applicant(s)

BLOMQUIST, HAROLD R.

Examiner

Edward A. Miller

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 04 December 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4, 6-9, 11, 12 and 15-20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 15-20 is/are allowed.
- 6) ☒ Claim(s) 1-4, 6-9, 11 and 12 is/are rejected.
- 7) ☒ Claim(s) 3 and 17 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

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1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

2. Claims 1-2, 4, 6-9, 11 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mehrotra et al., in view of Rogers et al., and Poole et al. '272.

Mehrotra et al. teaches preparing a solution of AN and phase stabilizer in water, forming a precipitate therefrom and drying such, and then grinding to form powder form. Further, although the method primarily used is drying at moderate temperature, as at col. 3, lines 1-6, Mehrotra et al. at col. 4, lines 15 clearly suggests freeze drying instead. However, details of the freeze drying process are not described in Mehrotra et al. Rogers et al. show a freeze drying process as applied to oxidizer salts such as ammonium perchlorate (col. 1, lines 10-11, 23-26, 39-41). Rogers et al. teach the conventional use of surfactants and solution processing prior to freeze drying to form the particulate oxidizer. The surfactant, col. 2, lines 19-24, 29-34 and 38-46, serves to limit crystal growth, which is desirable in the art to form small particle size. The freeze drying process, col. 2, lines 47-60, results in a porous friable mass of particles which may be further broken up or disintegrated, col. 3, lines 5-7. Although a drum is not taught in Rogers et al., use of any of a variety of notoriously well known apparatus means, including rotating drums, on which the coolant for freezing the solution may be flowed, would have been obvious. While applicant urges that the drum for freezing is not shown, the broad "comprising" scope claims are not deemed to define over the use of a drum surface with flowing Freon™ coolant over such drum, within the broad scope of the instant claims and within the ambit of Rogers et al., as at col. 5, lines 5-15, the weir being merely a solid surface upon which the coolant (lines 23-24) flows. When the particle size, a result effective variable, is too large, further disintegrating or grinding would have been obvious.

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In view of Poole et al. '272, for example at col. 4, lines 56-67 and col. 5, lines 45-53, it would have been obvious to substitute potassium nitrate for the potassium fluoride phase stabilizing salt, and in the usual phase stabilizing amounts. Variation of these notoriously well known ingredients and steps in the prior art process of freeze drying to produce PSAN powder would have been obvious to one of ordinary skill in the art. It is well settled that optimizing a result effective variable is well within the expected ability of a person of ordinary skill in the subject art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980), *In re Aller*, 220 F.2d 454, 105 USPQ 233 (CCPA 1955).

Applicants' argument about the amount of surfactant is not persuasive as follows. While, as argued, Rodgers et al. does teach in col. 3, lines 20-27, an "amount of say 0.5 to 5%", (emphasis added) this is followed by the teaching that this is to obtain a specific small particle size. Immediately thereafter in lines 26-27, omission of the surfactant is contemplated, with only a larger particle size being obtained. Thus, the amount is not a taught minimum, as argued by applicants, in view of the "say" which is similar to "generally", and in view of the teaching that it may be omitted entirely. Thus, the amount of surfactant is clearly a result effective variable that one of ordinary skill in the art may vary as suits the individual desire of the ordinary artisan. There does not appear to be any specified variable that yields any result not expected by the prior art.

3. However, the specific PVP surfactant claimed in claims 3 and 17 is not deemed to be reasonably suggested in the process as claimed. Claims 15-20 as currently amended are not reasonably suggested by the prior art, absent improper hindsight reconstruction. Therefore, claims 15-20 are allowed. Claims 3 and 17 are objected to as being dependent upon a rejected base claim, but they would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

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4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1-2, 4, 6-9, 11 and 12 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-21 of Sampson et al. U.S. Patent No. 6,641,622. Although the conflicting claims are not identical, they are not patentably distinct from each other, at least because of clear overlap. See MPEP 804.02-.03. The instant situation is where overlapping claims are present in the applications of two different inventive entities, with no overlap of any inventor, but apparently with a common assignee. It is not clear that minor details in certain of the instant claims define over the newly patented claims of Sampson et al.

6. Claims 1-2, 4, 6-9, 11 and 12 are directed to an invention not patentably distinct from claims 1-21 of commonly assigned Sampson et al.

In view of the trivial distinctions between the noted instant claims and those patented, applicants and assignee are required to maintain a line of distinction between Sampson et al. and this application. Further, applicant is required to state which was the prior inventor. The filing of a terminal disclaimer is not a sufficient reply to this requirement, because this is an issue of who was first to invent, 35 USC 102(g), the same patentable invention. Two distinct entities have, on the same filing date, presented claims apparently drawn to the same patentable invention, in the

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interference sense. The office will not normally institute an interference between an application and a patent assigned to the same assignee. See MPEP 2302. Further, assignee on the record is required to state whether this application and Sampson et al. are commonly owned, as it appears.

7. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a). In this situation, assignee's taking out of a patent on the Sampson et al. application is equivalent to an amendment of this application, since when the prior rejection was written, Sampson et al. was not a patent.


A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

8. Any inquiry concerning either this or an earlier communication from the Examiner should be directed to Examiner Edward A. Miller at (703) 306-4163. Examiner Miller may normally be reached Monday-Thursday, from 10 AM to 7 PM.

If attempts to reach Examiner Miller by telephone are unsuccessful, his supervisor Mr. Carone can be reached at (703) 306-4198.

If there is no answer, or for any inquiry of a general nature or relating to the application status, please call the Group receptionist at (703) 308-1113.

Miller/em
March 22, 2004



**EDWARD A. MILLER
PRIMARY EXAMINER**